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Attorneys for Defendants  
COUNTRYWIDE BANK FSB (now known as Bank of America, N.A.),  
and THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW  
YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT,  
INC. ALTERNATIVE LOAN TRUST 2006-17T1, MORTGAGE PASS  
THROUGH CERTIFICATES, SERIES 2006-17T1 (erroneously named as  
"CWALT Alternative Loan Trust 2006-17T1 Countrywide Home Loans,  
a.k.a. Bank of America")

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOSE A. ALEXANDER JR., and  
VELDA P. ALEXANDER

Plaintiffs,

v.

COUNTRYWIDE BANK FSB, a federal  
savings bank, CWALT Alternative Loan  
Trust 2006-17T1 Countrywide Home  
Loans, a.k.a. Bank of America, a business  
entity form unknown, and DOES 1  
through 40, inclusive,

Defendants.

Case No. 3:12-cv-00417-BTM-MDD  
(Assigned to Hon. Barry Ted Moskowitz)

**REPLY IN SUPPORT OF MOTION  
TO DISMISS PLAINTIFFS' FIRST  
AMENDED COMPLAINT**

[F.R.C.P. 12(b)(6)]

Date: May 25, 2012  
Time: 11:00 a.m.  
Ctrm: 15 – 5<sup>th</sup> Floor

FAC Filed: March 21, 2012  
Trial Date: None

**NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT**

Defendants Countrywide Bank FSB (now known as Bank of America, N.A.) (**BANA**) and The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-17T1, Mortgage Pass-Through Certificates, Series 2006-17T1 (erroneously named herein as "CWALT Alternative Loan Trust 2006-17T1 Countrywide Home Loans, a.k.a. Bank of America") (**BNYM**) (collectively **defendants**) hereby respectfully submit their reply in support of their motion to dismiss plaintiffs' first amended complaint (**FAC**).

### I. INTRODUCTION

Plaintiffs Jose and Velda Alexander (**plaintiffs**) challenge the pending sale of the property at issue, despite their admitted default under the loan agreement and failure to bring the loan current. Plaintiffs, however, cannot maintain any claims against defendants and their opposition to defendants' motion to dismiss plaintiffs' FAC (**Opposition**) adds nothing to their deficient claims.

First, each of plaintiffs' claims is barred by the applicable statute of limitations. All of plaintiffs' allegations concern the origination of their loan which took place in March 2006, nearly six years before plaintiffs filed this action! Despite their request, plaintiffs are not entitled to equitable tolling because their allegations concern the very terms of the loan documents provided to plaintiffs in March 2006 and plaintiffs do not provide the Court with a single reason why they could not have discovered the alleged fraud at closing. In addition, the three year statute of repose is an absolute bar to rescission under the Truth in Lending Act (**TILA**) and is not subject to equitable tolling under any circumstances.

Moreover, plaintiffs cannot challenge the completed sale without first tendering the amount due under the loan, pursuant to California's tender rule. In their Opposition, plaintiffs only address tender under TILA, which is inapplicable because plaintiffs' TILA claims are barred by the statute of limitations.

Plaintiffs also do not address an important issue raised in defendants' motion to dismiss. Plaintiffs allege both loans at issue were originated by BANA, but that is

1 clearly not the case, as demonstrated by the deeds of trust. The first loan was  
 2 originated by Countrywide Home Loans, Inc., an entity that is not even a party to this  
 3 action. As such, all of plaintiffs' allegations of wrongdoing pertaining to that loan are  
 4 inapplicable to defendants.

5 Defendants respectfully request the Court grant their motion to dismiss plaintiffs'  
 6 FAC without leave to amend.

## 7 II. ARGUMENT

### 8 A. Each of Plaintiffs' Claims Is Barred by the Statute of Limitations

9 Each of plaintiffs' claims is based on alleged fraud or TILA violations during the  
 10 origination of the loan in March 2006. As such, each of plaintiffs' claims is barred by  
 11 the applicable statute of limitations. Fraud carries a three year statute of limitations  
 12 under *Code of Civ. Proc.* § 338(d) and, as will be discussed in more detail *infra*,  
 13 plaintiffs' claims under TILA are barred by the absolute three year statute of repose.

14 As discussed at length in defendants' motion to dismiss, plaintiffs can show no  
 15 set of facts to justify equitable tolling of the three year statute of limitations. Where it  
 16 is apparent from the face of the complaint that plaintiff's claim is time-barred absent  
 17 equitable tolling for discovery, plaintiff "must specifically plead facts to show (1) the  
 18 time and manner of discovery and (2) the inability to have made earlier discovery  
 19 despite reasonable diligence." *Espinoza v. Recontrust Co.*, No. 09-CV-1687-IEG  
 20 (RBB), 2010 WL 1568551, at \*6 (S.D. Cal. April 19, 2010), citing *Fox v. Ethicon Endo*  
 21 *Surgery*, 35 Cal.4th 797, 808 (2005). With regard to any such delay, "the court places  
 22 the burden on the plaintiff to 'show diligence.'" *Id.* Courts have routinely refused to toll  
 23 the statute of limitations for fraud claims after plaintiffs have received a mortgage  
 24 statement for an unexpected amount. *See, e.g., Rosenfeld v. JP Morgan Chase Bank*,  
 25 732 F.Supp.2d 952, 971 (N.D. Cal. 2010) (refusing to toll state of limitations for fraud  
 26 claim based on alleged false statement by mortgage broker "that the payment would not  
 27 increase" and noting that "Plaintiff presumably received mortgage statements in  
 28 connection with the loan and even admits that his loan adjusted annually."). Plaintiff

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cannot invoke the discovery rule to toll the statute of limitations during a period when the information he claimed not to know was in his note and deed of trust. *See Hague v. Wells Fargo Bank*, Slip Copy, 2012 WL 1029668, at \*5 (N.D. Cal. Mar. 26, 2012) (granting motion to dismiss borrower's fraud claim against lender as untimely under section 338(d) and refusing to apply the discovery rule because "[w]here there existed, from the time the loan was made, papers which disclosed the terms of the loan, it would seem that reasonable diligence would have enabled Plaintiff to discover the problem.").

Plaintiffs do not sufficiently address this issue in their Opposition, merely stating that they did not discover the alleged fraudulent misrepresentations until December 2011. (Opposition, p. 5.) Plaintiffs cannot reasonably claim their apparent failure to review the loan documents was justified. "[I]t is generally unreasonable...to neglect to read a written agreement before signing." *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal.4th 394, 424 (1996) (dismissing with prejudice a claim for intentional misrepresentation where plaintiffs alleged their claim was tolled because they did not discover the alleged fraudulent statements in loan documents until well after they signed the documents).

For these reasons, each of plaintiffs' claims is barred by the statute of limitations.

### **B. Plaintiffs' Inability to Tender Bars Their Claims**

As discussed at length in defendants' motion to dismiss, if a defaulting borrower requests relief in equity, *i.e.*, setting aside or challenging a foreclosure proceeding, the borrower must first do equity himself by paying the entire loan amount prior to the sale. *See Arnolds Mgmt. Corp. v. Eischen*, 158 Cal.App.3d 575, 578-79 (1984); 4 Miller & Starr, *California Real Estate* § 9:154 at 507-08 (2d ed. 1989).

Here, plaintiffs assert they have satisfied their obligation to tender because they have alleged they were willing and able to tender the principal amount due pursuant to 15 U.S.C. § 1635(b), not including certain charges or interest. (Opposition, p. 3.) Section 1635(b), however, is inapplicable as it only applies to tender following

1 rescission under TILA. As will be discussed in detail below, plaintiffs' rescission claim  
2 under TILA is barred by an absolute three year statute of repose and so plaintiffs'  
3 tender obligation has nothing to do with section 1635(b).

4 Plaintiffs have not satisfied their obligation to make an unambiguous tender of  
5 the entire amount due under their loan obligation and so they are barred from  
6 challenging the sale.

### 7 **C. Plaintiffs' Individual Claims Fail**

#### 8 **1. Plaintiffs' Fraud Claims Fail**

9 Plaintiffs' first and seventh causes of action are for intentional misrepresentation  
10 and fraud. Therein, plaintiffs allege defendants made certain misrepresentations to  
11 plaintiffs concerning the terms of the loan and concealed material facts from plaintiffs  
12 concerning plaintiffs' ability to repay the loan in order to induce plaintiffs to enter into  
13 the loan agreement. (FAC, ¶¶ 27-29, 69-70.) As discussed above, these claims are  
14 long barred by the statute of limitations and are not subject to equitable tolling. These  
15 claims also fail to the extent they are based on alleged wrongdoing by the originator of  
16 the first loan on the property, as that entity is not even a party to this action.

17 Plaintiffs' fraud claims are also not pled with the requisite specificity under  
18 Federal Rule of Civil Procedure 9(b). Allegations of fraud must be accompanied by  
19 "the who, what, when, where, and how" of the misconduct charged. *Cooper v. Pickett*,  
20 137 F.3d 616, 627 (9th Cir. 1997) (internal quotation marks omitted). Furthermore,  
21 when bringing an action for fraud against a corporation, a plaintiff must also  
22 specifically allege the names of the persons who made fraudulent statements, their  
23 authority to speak, to whom they spoke, what they said or wrote, and when it was said  
24 or written. See *Tarmann v. State Farm Mutual Automobile Ins. Co.*, 2 Cal.App.4th  
25 153, 157 (1991). The policy of liberal construction of the pleadings will not be  
26 invoked to sustain a pleading alleging fraud. *G.D. Searle & Co. v. Superior Court*, 49  
27 Cal.App.3d 22, 29 (1975); *Lazar v. Superior Court*, 12 Cal.4th 631, 645 (1996).  
28

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1 Plaintiffs assert they have satisfied their pleading requirements by alleging the  
 2 fraudulent representations were made by the lender at origination but, as discussed  
 3 above, plaintiffs have not even named the correct lender. Nor do plaintiffs allege who  
 4 they spoke with or what authority that person had to speak for defendants. Plaintiffs'  
 5 allegations are inadequate and fail.

## 6 **2. Plaintiffs' Breach of Covenant Claim Fails**

7 Plaintiffs allege defendants breached the covenant of good faith and fair dealing  
 8 by failing to disclose material information during the loan application process and  
 9 improper disclosure of the amount financed. (FAC, ¶ 38.) Plaintiffs, however, cannot  
 10 plead the elements of this claim. First, they cannot allege they did all of the things the  
 11 contract required because they do not deny they defaulted under the terms of the loans.  
 12 Plaintiffs do not address this issue, thereby conceding the same. Second, plaintiffs  
 13 cannot allege defendants did anything to interfere with their rights under the contracts  
 14 because plaintiffs received all money they were entitled to under the loan agreements.  
 15 Plaintiffs assert defendants impeded their rights to receive the benefits of the loan by  
 16 understating the amount financed, but the amount financed was part of the contract  
 17 they agreed to and so it could not have affected their rights to the benefits of the loan.

18 Plaintiffs' claim is also barred by the statute of limitations. The statute of  
 19 limitations for a claim for breach of the covenant of good faith and fair dealing is four  
 20 years. *Cal. Code of Civ. Proc.* § 337. Here, plaintiffs bring allegations concerning the  
 21 origination of the loan in March 2006, which took place almost six years before  
 22 plaintiffs filed this action. Plaintiffs again assert the statute should be tolled because  
 23 they did not discover the facts constituting this claim until recently, but their argument  
 24 fails for the reasons discussed in Section IV.A, *supra*. Plaintiffs have not provided a  
 25 single reason why they could not discover the terms of the loan at closing.

## 26 **3. Plaintiffs' TILA Claim Fails**

27 Plaintiffs allege defendants violated provisions of TILA and the Home  
 28 Ownership and Equity Protection Act (**HOEPA**) by lending without regard to



1 repayment ability and by failing to deliver all material disclosures required by TILA.  
2 (FAC, ¶¶ 55-59.) Plaintiffs request statutory damages and rescission based on the  
3 alleged violations.

4 Plaintiffs' claims for both damages and rescission are time-barred. A TILA  
5 action to recover damages must be brought "within one year from the date of the  
6 occurrence of the violation." 15 U.S.C. § 1640(e). The pertinent date of occurrence is  
7 the closing date. *See King v. California*, 784 F.2d 910, 915 (9th Cir. 1986). As for  
8 rescission, under 15 U.S.C. § 1635(f), a plaintiff's extended rescission right under  
9 TILA expires after three years or when the property is sold, whichever occurs first.  
10 Rescission is therefore no longer available to plaintiffs under TILA because of the statute of  
11 repose. Section 1635(f) "is a statute of repose that represents an absolute three-year bar on  
12 rescission actions." *McOmie-Gray v. Bank of America Home Loans*, 10-16487 (9th Cir. 2-8-  
13 2012).

14 Plaintiffs argue that the statute of limitations should not bar their claims because  
15 "recoupment is a defense that is never barred by the statute of limitations so long as the  
16 foreclosure itself is taking place." (Opposition, p. 12.) Plaintiffs' argument is nonsensical.  
17 This is not an action to collect the debt and so plaintiffs have no right of recoupment.  
18 In addition, the Court in *Dalm* (the main case cited by plaintiffs in support of their  
19 recoupment argument) actually declined to apply recoupment principles and distinguishes  
20 the *Bull* case. Moreover, the *Dawe* case cited by plaintiffs is no longer good law – *see*  
21 *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 415 (1998) – and plaintiffs do not even attempt  
22 to address the *McOmie-Gray* case from the 9<sup>th</sup> Circuit cited in defendants' moving papers.

23 Plaintiffs' TILA claims are clearly barred by the applicable statute of limitations and  
24 statute of repose.

#### 25 4. Plaintiffs' Declaratory Relief and Quiet Title Claims Fail

26 Plaintiffs' declaratory relief and quiet title claims are entirely based on their  
27 claims for fraud and violation of TILA. As those claims fail for the reasons discussed  
28 above, plaintiffs are not entitled to declaratory relief or an order quieting title in their

1 name. In addition, plaintiffs' quiet title claim fails based on their inability to tender the  
2 amount due, as discussed in Section IV.B, *supra*.

### 3 **5. Plaintiffs' UCL Claim Fails**

4 Plaintiffs' UCL claim is also based on their deficient fraud and TILA claims and  
5 fails for the reasons discussed above. In addition, plaintiffs do not plead their claim  
6 with the requisite particularity, it is barred by the statute of limitations and BNYM  
7 cannot be held vicariously liable for the alleged wrongdoing of others. Plaintiffs do not  
8 address these issues in their Opposition, thereby conceding the same.

### 9 **6. Plaintiffs Are Not Entitled to an Accounting**

10 In plaintiffs' final cause of action they request an accounting. (FAC, ¶ 79.)  
11 Plaintiffs are not entitled to an accounting because their underlying allegations all fail  
12 and because they cannot plead a fiduciary relationship with defendants.

13 In their Opposition, plaintiffs merely restate their allegations under TILA. As  
14 plaintiffs cannot maintain a TILA claim, they are not entitled to an accounting.

### 15 **III. Defendants' Motion to Expunge Should Be Granted**

16 Plaintiffs' opposition to defendants' motion to expunge plaintiffs' lis pendens is  
17 based on all of the same arguments discussed above. As plaintiffs cannot maintain any  
18 real property claims against defendants, plaintiffs' lis pendens should be ordered  
19 expunged from the public record.

### 20 **IV. CONCLUSION**

21 All of plaintiffs' claims fail because each is barred by the applicable statute of  
22 limitations as the alleged conduct at issue took place nearly six years before plaintiffs  
23 filed this action. In addition, plaintiffs' claims are poorly pled and plaintiffs' inability to  
24 tender bars their claims.

25 Defendants respectfully request the Court grant their motion to dismiss plaintiffs'  
26 FAC without leave to amend.



1 Dated: May 17, 2012

**AKERMAN SENTERFITT LLP**

2  
3 By: /s/Michael B. Wall

4 Michael B. Wall  
5 Attorneys for Defendants  
6 COUNTRYWIDE BANK FSB (now  
7 known as BANK OF AMERICA, N.A.)  
8 and The Bank of New York Mellon f/k/a  
9 The Bank of New York, as Trustee for the  
10 Certificate Holders CWALT, Inc.  
11 Alternative Loan Trust 2006-17T1,  
12 Mortgage Pass-Through Certificates,  
13 Series 2006-17T1 (erroneously named  
14 herein as "CWALT Alternative Loan  
15 Trust 2006-17T1 Countrywide Home  
16 Loans, a.k.a. Bank of America")  
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**PROOF OF SERVICE**

I am employed in the City and County of Denver, State of Colorado. I am over the age of 18 and not a party to the within action. My business address is 1400 Wewatta Street, Suite 500, Denver, Colorado 80202.

On **May 17, 2012**, I served the following documents by placing a true copy thereof in a sealed envelope(s) on the persons below as follows:

**REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

Steve W. Haskins  
Jesse T. Farris  
HASKINS & ASSOCIATES, APC  
4045 Bonita Road, Ste. 206  
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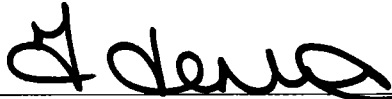
☒ (CM/ECF Electronic Filing) I caused the above document(s) to be transmitted to the office(s) of the addressee(s) listed above by electronic mail at the e-mail address(es) set forth above pursuant to Fed.R.Civ.P.5(d)(1). "A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P.5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction this service was made and that the foregoing is true and correct.

- ☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- ☒ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on **May 17, 2012**, at Denver, Colorado.

Tracie Jenkins  
(Type or print name)

  
(Signature)

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